

SERVICE DATE – MARCH 4, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35688

TRANSCO RAILWAY PRODUCTS INC.—ACQUISITION
AND OPERATION EXEMPTION—D&W RAILROAD LLC

Digest:¹ Transco Railway Products Inc. (Transco) does not need Board authorization to acquire from D&W Railroad LLC and to operate certain tracks in Oelwein, Iowa. Consequently, the Board is dismissing a notice of exemption filed by Transco seeking such authorization.

Decided: March 1, 2013

November 5, 2012, Transco Railway Products Inc. (Transco), a noncarrier, filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from D&W Railroad LLC (D&W) and to operate approximately 23 miles of tracks in Oelwein, Iowa (the Subject Tracks). Concurrently, Transco filed a motion to dismiss the notice, asserting that, based on its proposed use of the tracks, Transco does not need Board authority to acquire and operate them. The motion is unopposed. We will grant the motion to dismiss.

BACKGROUND

Transco has performed rail car repair services at a facility located in Oelwein, Iowa (Facility), since 1969. Iowa Northern Railway Company (IANR) currently provides common carrier rail service to the Facility.² In 2003, D&W Railroad Inc. (DWR), an affiliate of Transco, acquired from UP a rail line between Dewar, Iowa, and Oelwein (the Main Line), inclusive of the Subject Tracks (further defined below), as well as the underlying real property.³ DWR and IANR entered into an operating agreement, pursuant to which IANR has provided common

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Prior to IANR's service, Union Pacific Railroad Company (UP), and before that Chicago and North Western Transportation Company (CNW), provided service to the Facility.

³ See D&W R.R.—Acquisition Exemption—Rail Lines of Union Pac. R.R., FD 34401 (STB served Oct. 8, 2003) (2003 Acquisition Exemption).

carrier rail service over the Main Line since 2003.⁴ In 2005, D&W, an affiliate of Transco and DWR, acquired from DWR all of DWR's track and underlying property rights, including the Subject Tracks, and took assignment of the operating agreement between DWR and IANR. The Subject Tracks were included in the description of the property acquired in both the 2003 and 2005 acquisitions.⁵ Transco states that the Subject Tracks are located wholly in what was formerly a UP rail yard, and before that a CNW yard, adjacent to the Facility. Here, Transco seeks to acquire the Subject Tracks but to continue to operate on them just as it had before.

The Subject Tracks generally consist of: (1) a series of approximately 24 parallel, stub-ended track segments, the longest of which is about 1 mile in length (identified as the "Stub-ended Tracks"); (2) track segments that connect to the Main Line, which segments include three parallel tracks northeast of the Stub-ended Tracks (identified as Track Nos. 0, 1, and 2), and tracks identified as the "Depress Track," the "Back Lead," and the "Freight Track" (the Freight Track leads to the Facility); and (3) track segments identified as the "Round House Track" and the "Diesel Track" (each of which connects to the Freight Track), and the "Crossover Track" (which connects the Freight Track to the Back Lead track). The tracks are located west of the Main Line, north of Fourth Street S.W., and south of 50th Street in Oelwein.

Transco states that IANR (as did UP and CNW before it) uses the Subject Tracks only to drop off inbound rail cars to the Facility and pick up outbound rail cars. IANR operates on the Subject Tracks pursuant to the operating agreement originally reached with DWR. According to Transco, IANR uses Bryant Yard in Waterloo, Iowa, as its main yard facility. Transco further states that it uses the Subject Tracks almost exclusively to store and stage rail cars delivered to the Facility for repairs prior to working on the cars, and to store and stage repaired cars prior to IANR's outbound movement. Transco adds that it maintains the Subject Tracks rather than IANR. According to Transco, it typically stores or stages between 1,000 and 1,200 rail cars on the Subject Tracks, with that number going as high as 1,800. Transco explains that it expects its use of the Subject Tracks to continue unchanged, and that it does not now, nor will it in the future, hold itself out to provide common carrier rail service.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10906, the Board does not have authority over the acquisition or operation of spur, industrial, team, switching, or side tracks. The Board has held, however, that the type of track at issue is not the only consideration when determining whether the Board has authority over a given transaction. See Effingham R.R.—Operation Exemption—Line Owned by Total Quality Warehouse, 2 S.T.B. 606 (1997), reconsideration denied, Effingham R.R.—Pet. for Declaratory Order—Constr. at Effingham, Ill., et al. (Effingham), NOR 41986, et al. (STB

⁴ See Iowa N. Ry.—Operation Exemption—Rail Lines of D&W R.R., FD 34402 (STB served Oct. 8, 2003).

⁵ See 2003 Acquisition Exemption; D&W R.R., LLC—Acquisition Exemption—D&W R.R., FD 34770 (STB served Nov. 23, 2005).

served Sept. 18, 1998), aff'd sub nom. United Transp. Union v. STB, 183 F.3d 606 (7th Cir. 1999). In Effingham, the Board stated that whether track is considered excepted under § 10906 or a railroad line depends on the intended use of the track segment. Effingham, slip op. at 4; see also Nicholson v. ICC, 711 F.2d 364 (D.C. Cir. 1983). The Board found further that “in those cases where a tenant railroad’s intended use of a track segment is different from the use made by the railroad owning the track, we have determined that the tenant’s use, rather than the character of the trackage itself, is controlling with regard to its own operations....” Id.

Additionally, in Chicago Rail Link, L.L.C.—Lease and Operation Exemption—Union Pacific Railroad Company, FD 33323 (STB served Sept. 2, 1997), the Board determined that it has “jurisdiction over a notice of exemption concerning the lease and operation of railroad lines that had formerly been used as yard tracks, spurs, and sidings, when the tenant carrier intends to use the track to extend its operations to reach new customers.” Effingham, slip op. at 5-6. Moreover, in MVC Transportation, LLC—Acquisition Exemption—P&LE Properties, Inc., FD 34462, slip op. at 6 (STB served Oct. 20, 2004) (MVC), the Board applied Effingham to a sale of track, finding that “[t]he fact that the track was excepted when it was used by [the seller] does not mean that it could not be used as main line track by a new operator...for whom it would be a new or extended line of railroad.”

The record before us establishes that the Subject Tracks, as used by Class III carriers D&W and IANR, are § 10906 spur or yard track. First, the record indicates that the Subject Tracks have always been used by the railroads as excepted track. The Subject Tracks have been used to store, stage, and move railcars and have not been used to serve or access any other rail customers or to perform any common carrier activities. Second, Transco has shown that post-acquisition it intends to continue to store, stage, and move railcars sent to it for repair at its Facility to support its own business operations. Transco has stated that it will not hold itself out as a rail common carrier serving other shippers, and that its operations will not extend beyond serving the Facility. Finally, the inclusion of the Subject Tracks in the description in the 2003 and 2005 acquisition exemptions did not change their nature from excepted track under 49 U.S.C. § 10906 to common carrier track. Indeed, the 2003 notice specifically referred to the Subject Tracks as “yard tracks,” and the 2005 notice further acknowledged that the transfer of the Subject Tracks, as yard track, did not require Board approval or exemption under 49 U.S.C. § 10906. Transco’s acquisition of the Subject Tracks thus does not constitute an initial common carrier railroad operation or comprise an entire common carrier line of railroad for which, under Effingham and MVC, it would need to obtain Board authority. Accordingly, we will grant Transco’s motion to dismiss its previously filed notice of exemption to acquire and operate the Subject Tracks.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Transco's motion to dismiss the verified notice of exemption in this proceeding is granted and the notice is dismissed.

2. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.